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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

LANE KELLY WHITTENBERG,

Plaintiff,

v.

JOSE TOVAR AYALA; PHILIP  
BLACKMAN; and, MATTHEW WHYTE, in  
their individual capacities, and DOE 1,

Defendants.

Case No. 1:22-CV-00197-JLT-EPG

**REVISED/UPDATED STIPULATION OF  
THE PARTIES REGARDING THE  
DEPOSITION OF PLAINTIFF; ORDER OF  
THE COURT**

Plaintiff, LANE KELLY WHITTENBERG (“WHITTENBERG”) and Defendants, JOSE  
TOVAR AYALA, PHILLIP BLACKMAN, and MATTHEW WHYTE, (jointly “Defendants”) by  
and through their respective counsel, hereby jointly Stipulate and Agree to the following:

1           1.       On February 17, 2023, this Court issued an Order (Doc. #30) providing “leave” for  
2 counsel for Defendants to take the “in person” deposition of Plaintiff who was, at the time of the  
3 Order, incarcerated at USP Victorville located in Adelanto, California.

4           2.       Upon receipt of the Order, arrangements were made with the prison for Plaintiff to be  
5 deposed on April 14, 2023.

6           3.       On March 14, 2023, the parties by stipulation sought an order from the Court relating  
7 to confidential attorney-client communications between Plaintiff and his counsel. (See, Doc. #31).

8           4.       On March 16, 2023, the Court issued an Order (Doc. 32) giving the Warden of USP  
9 Victorville an opportunity to respond to the parties’ Stipulation (Doc. #31) by March 24, 2023.

10          5.       On March 20, 2023, counsel for the parties were contacted by Brendon L. S. Hansen,  
11 Assistant U.S. Attorney, and were advised and informed that Plaintiff was no longer being housed at  
12 USP Victorville and would be housed in a different location for approximately nine months.

13          6.       The parties advised the Court of the change in circumstances associated with the  
14 deposition of Plaintiff by way of their March 22, 2023 Stipulation (see Doc. #34).

15          7.       The Court issued an Order (Doc. #35) on March 23, 2023, in part finding good cause  
16 to deny the parties’ March 14, 2023, Stipulation (Doc. #31) and the Court’s corresponding March 16,  
17 2023, Order (Doc. #32) as moot based on the change in circumstances and requiring the parties to  
18 submit a new stipulation and proposed order requesting “leave” to depose Plaintiff.

19          8.       The parties have since been advised that Plaintiff is currently incarcerated and  
20 confined at **USP Florence High** located in Fremont County near Florence, Colorado.

21          9.       As part of this current civil litigation, Plaintiff has asserted various claims, allegations  
22 and seeks the recovery of monetary damages against each of the three named Defendants.

23          10.       As such, Defendants are entitled to take the deposition of Plaintiff in order to question  
24 him regarding the facts and circumstances of the alleged events, his alleged damages, and other  
25 aspects of this litigation.

26          11.       Due to Plaintiff’s incarceration, an Order from this Court, pursuant to FRCP, Rule  
27 30(a)(2)(B), is required in order to complete the oral deposition of Plaintiff.

28          12.       The parties to this Stipulation have “met and conferred” on this issue.

1           13.     The parties request for “leave” of Court to take the deposition of Plaintiff as further  
2 discussed by the parties and the Court during the February 1, 2023 Mid-Discovery Status Conference  
3 at which time the Court indicated it would entertain a Stipulation from the parties requesting “leave”  
4 to take the deposition of Plaintiff and as was previously Ordered (see, Doc. #30) by the Court.

5           14.     The parties agree that “good cause” exists for the deposition of Plaintiff in this civil  
6 action.

7           15.     The parties agree that the deposition will be set on a date and time that is agreeable to  
8 all counsel and the respective prison.

9           16.     The parties agree and request that personnel from USP Florence High communicate  
10 directly with counsel Plaintiff regarding the logistics, arrangements, and procedural requirements  
11 necessary for the civil deposition of Plaintiff.

12           17.     The parties agree that, to the extent permitted by USP Florence High, a reasonable  
13 amount of time should be extended to Plaintiff’s counsel for a pre-deposition meeting; and, therefore,  
14 communications between USP Florence High and Plaintiff’s counsel should take place to coordinate  
15 these pre-deposition confidential attorney-client communications.

16           18.     Defendants request that Plaintiff be made available for an “in-person” deposition in  
17 accordance with the rules, regulations and requirements of the penitentiary, and that Defendants’  
18 attorney(s), the Videographer and the Court Reporter (and their approved gear/equipment) to all be  
19 in the same room as Plaintiff to complete this deposition. However, Defendants are willing to have  
20 the Videographer and/or Court Reporter appear remotely, via videoconferencing, should such  
21 accommodations be possible. But, in order to most effectively be able to depose Plaintiff, counsel  
22 for Defendants requests that he or she be permitted to conduct the deposition “in person” in that both  
23 defense counsel and Plaintiff would be in the same room.

24           19.     Counsel for Plaintiff requests that she be permitted to defend the deposition remotely,  
25 via video conference, presuming that such an accommodation is technologically possible and in  
26 accordance with the rules, regulations and requirements of the penitentiary.

27           20.     The parties also request that a separate laptop or computer with a monitor be made  
28 available for the deposition of Plaintiff to allow counsel for Defendants to display to Plaintiff video

1 footage of the March 3, 2021, which forms the basis of this civil litigation.

2       21. The parties further agree, if permitted by the prison, that either video conferencing or  
3 telephonic conferencing be permitted to allow the named Defendants to “appear” at requested  
4 Plaintiff’s “in person” deposition, remotely, via these means. The parties however stipulate that  
5 Defendants will only be allowed to listen in on the deposition, will not participate or otherwise speak  
6 during the deposition, and that if their “appearance” is by video conference, their video-camera will  
7 be off during the deposition. Defendants however will be permitted to speak to their attorney of  
8 record and use their cameras during breaks.

9       22. The parties agree that, should the above-referenced prison not allow for an “in person”  
10 deposition, then Plaintiff be permitted, assuming the availability of computer or tablet for Plaintiff’s  
11 use, to participate in a remote deposition. Under these events, Plaintiff’s deposition would be in  
12 accordance with the previously executed “Joint Stipulation Concerning Agreed Upon Protocol for  
13 Conducting Remote Depositions.”

14 Dated: March 29, 2023

McCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP

15  
16 By: /s/ Daniel L. Wainwright  
17 Mart B. Oller IV  
18 Daniel L. Wainwright  
19 Attorneys for Defendants  
JOSE TOVAR AYALA; PHILIP BLACKMAN; and,  
20 MATTHEW WHYTE  
21  
22

23 Dated: March 29, 2023

24 By: /s/ Raquel M. Busani  
25 Robert J. Rosati, Esq.  
26 Raquel M. Busani, Esq.  
27 Attorneys for Plaintiff,  
LANE KELLY WHITTENBERG  
28

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**ORDER OF THE COURT GRANTING LEAVE TO DEPOSE PLAINTIFF & PRE-DEPOSITIONS COMMUNICATIONS BETWEEN PLAINTIFF AND HIS ATTORNEY**

The Court having considered the parties Stipulation and good cause appearing, the Court hereby ORDERS that:

1. Defendants, JOSE TOVAR AYALA; PHILIP BLACKMAN; and, MATTHEW WHYTE, have this Court's leave to take the oral deposition of Plaintiff (and Inmate), LANE KELLY WHITTENBERG, pursuant to Rule 30 of the Federal Rules of Civil Procedure and the terms of the parties' stipulation;

2. Prior thereto, counsel shall give notice of this Order to USP Florence High, U.S. Penitentiary, located near Florence, Colorado, and shall coordinate with them so that the taking of the deposition of Inmate LANE KELLY WHITTENBERG shall be set and noticed for a time and place that it is agreeable to the parties but that will also minimize disruption to the orderly operations of the prison;

3. Personnel from USP Florence High will communicate directly with personnel from Plaintiff's counsel's office, i.e., ERISA Law Center, regarding the scheduling, rules, regulations, requirements, etc. associated with Plaintiff's civil deposition;

4. Plaintiff's counsel shall be allowed to have reasonable private, confidential and unrecorded communications with Plaintiff, as permitted by USP Florence High, prior to the deposition of Plaintiff.

IT IS SO ORDERED.

Dated: March 30, 2023

/s/ Eric P. Grogan  
UNITED STATES MAGISTRATE JUDGE